

### **MODEL ANSWER - QUESTION I - FEBRUARY 2006**

PLEASE NOTE: QUESTION I was a "Multistate Performance Test" (MPT) will not be answered here.

### **MODEL ANSWER - QUESTION II - FEBRUARY 2006**

PLEASE NOTE: QUESTION II was a "Multistate Performance Test" (MPT) will not be answered here.

### **MODEL ANSWER - QUESTION III - FEBRUARY 2006**

1. The two most promising bases upon which Farmer may avoid her agreement to pay Owner on the basis of the known facts are the statute of frauds and the doctrine of mutual mistake.
2. In order to recover from Farmer, Landscaper must establish that there was a contract between them. The absence of a written or even a specific oral agreement notwithstanding, a meeting of the minds sufficient to form a contract could be evidenced by the parties' conduct, especially when taken in the context of their prior dealings.

Even though no specific contract terms (e.g. timing, job specifications, price) were discussed, the trier of fact might be able to construe offer and acceptance from Farmer's statement and Landscaper's response by nodding "in his characteristic, understated way," especially if they had conducted business in that manner in the past. In that event, where a provision is missing from a contract, a court may impose a reasonable term based on the parties' prior dealings and current market conditions.

Landscaper also may seek to recover based on a theory of quantum meruit and/or unjust enrichment. Such claims in quasi contract are based on an implied promise to pay (in the absence of a formal contract) when a party receives a benefit and the retention of that benefit would be inequitable. The standard is "whether, in light of the totality of the circumstances, it is against equity and good conscience to allow the defendant to retain what is sought to be recovered." *Legault v. Legault*, 142 Vt. 525. In this instance, Landscaper would seek to show that a benefit was conferred upon Farmer, that Farmer accepted that benefit, and that it would be inequitable for Farmer not to compensate Landscaper for the value of that benefit. *DJ Painting, Inc., v. Barber Enterprises, Inc.*, 172 Vt. 239.

The measure of damages in quantum meruit is determined by the reasonable value of the plaintiff's services. In re: *Estate of Elliott*, 149 Vt. 248. (Landscaper would likely seek quantum meruit damages in this instance, based on the argument that he should receive compensation because he justifiably relied on Farmer's request for his services, regardless of whether Farmer did, in fact, receive a benefit). The measure of damages for unjust enrichment is based on the value of the benefit actually conferred upon the defendant. (Farmer may argue that he received

no benefit from Landscaper's work, and where there is no evidence of inequity, there can be no damages in quasi contract). *DJ Painting, Inc., v. Barber Enterprises, Inc.*, above.

3. Landscaper cannot sue Owner for breach of contract because Landscaper does not have any direct contract with Owner. Even though there is no privity between Landscaper and Owner, Landscaper may be able to make an equitable claim against Owner on the basis of the unjust enrichment and/or quantum meruit principles set forth above.

- a. Statute of Frauds: Generally, a party cannot bring an action at law to enforce an unwritten, unsigned contract for the sale of an interest in lands. 12 V.S.A. § 181 (5). A lease in land is an interest in land for the purposes of the statute of frauds analysis. *Heathcoate Associates v. Chittenden Trust*, 958 F.Supp. 182 (1997). However, an oral agreement may be removed from the statute of frauds if the proponent can show that he or she underwent a substantial and irretrievable change in a position in reliance on the agreement. *Quenneville v. Buttolph*, 1003 VT 82, 175 Vt. 444 (2003).

In this case, Owner and Farmer had an unwritten, unsigned contract for the transfer of an interest in lands. Owner, as the proponent of the contract, may be able to show that she underwent a substantial and irretrievable change in position in reliance on the agreement when she paid a house mover to remove her double-wide trailer from the parcel. If the factfinder concludes that Owner's actions did lead to a substantial and irretrievable change in position, the oral agreement will not fall within the statute of frauds.

b. Mutual Mistake: Where parties enter into a contract under a mutual mistake regarding a material fact, the contract may be avoided in a court of law. *Ferris v. Ferris*, 140 Vt. 12, 15. The mistake must be one vitally affecting a material fact or facts on the basis of which the parties have contracted, and must be mutual. *Id.* In addition, a party cannot seek to void a contract on the basis of mutual mistake if that party bears the risk of mistake. Restatement (Second) Contracts § 152.

A party bears the risk of a mistake when (a) the risk is allocated to that party by agreement of the parties, or (b) the party is aware, at the time the contract is made, that he or she has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to the party by the court on the ground that it is reasonable in the circumstances to do so. Restatement (Second) Contracts § 154.

In this case, Farmer and Owner both apparently mistakenly assumed that the parcel was suitable for organic farming. The mistake was mutual, and related to a fact both parties understood to be material to the contract. A court will allow Farmer to avoid the contract with Owner unless the Court concludes that Farmer should bear the risk of mistake under the circumstances. See *Rancourt v. Verba*, 165 Vt. 225 (1996) (where buyer and seller both mistakenly assumed that buyer could build residence on lakefront property that turned out to be a federally-protected wetland, proper remedy for mutual mistake was rescission).

## MODEL ANSWER - QUESTION IV - FEBRUARY 2006

1. You are an attorney practicing law in Vermont. Your client wants you to handle the defense of a lawsuit, and agrees to pay you monthly. You ask for, and your client agrees to pay, a retainer of \$50,000, to be used for this purpose. Your client has asked that you keep the funds invested in an interest bearing savings account, located at a large bank outside of Vermont, where you have a long-standing personal banking account in which you currently have on deposit only \$50, to cover the monthly bank service charges, and the benefit of automatic overdraft protection.

2. You decide to practice law with two other lawyers (all of you have been practicing separately for the past year). Also, you decide to hire a paralegal from a fourth law practice.

3. You are a third year associate in a medium sized law firm, and you arrive home after an exhausting day at the office. You learned, in confidence, three months ago that New Client, a new client of the firm, has infringed upon a patent held by Inventor, an individual that the firm has represented for many years in filing patent applications. You call this to the attention of the partner in charge of the New Client, who assures you he will take care of the problem. Today you learn that the firm and New Client have just agreed that the firm will handle all of New Client's patent litigation. When you spoke with the partner in charge again today, he explained that there was not yet any patent litigation between New Client and Inventor, and that there would likely never be any such litigation, as it was unlikely that the Inventor would ever find out about the infringement. He also explained that New Client was critical to the financial fortunes of the law firm. "If we lose New Client we may need some layoffs around here" was his comment when you inquired why he had not terminated the representation of the New Client. He added: "Besides, I am the partner in charge here, and I believe there is at present no real conflict of interest. If a conflict ever arises in the future, we will deal with it then. That settles the question."

- a. Explain your record-keeping obligations, and further explain how the deposit of the retainer payment into this account should be analyzed under the Vermont Rules of Professional Conduct? Explain how the Vermont Rules of Professional Conduct would apply to the automatic overdraft protection feature of this account.
- b. Explain the rules set forth in the Vermont Rules of Professional Conduct concerning interest on funds paid by a client as a retainer and whether your client may earn interest on these funds.
- c. You issue a bill for you first month's services within days after the end of that month, and you transfer client funds sufficient to pay the bill in full on the same day. Explain how this practice properly would be analyzed under the Vermont Rules of Professional Conduct
- d. Your client disputes some of the charges, and you believe there is no merit to your client's objections. What are your responsibilities concerning the amount of the disputed charges?

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**Records must be established keeping track of the funds, including a ledger that shows every deposit and every withdrawal from the account. Commingling of lawyer and client funds is not allowed. Under Rule 1.15, client funds must be kept separate from lawyer funds, not in law account or in personal bank account of lawyer. Although lawyer may keep small amounts on deposit to cover bank charges, and the \$50 here would seem to comply with that exception to the commingling rule, Rule 1.15 would not allow the funds to be kept in an account that is in the lawyer's personal name, but only in a "Client Trust Account."**

**Under Rule 1.15C, funds may be deposited only in trust accounts or escrow accounts with approved institutions. The requested bank may be used only if it is approved by the Professional Conduct Board (and has agreed to follow the PCB's automatic overdraft notification rules). Automatic overdraft protection would not only violate the overdraft notification rules, but would represent a loan to the lawyer, and then impermissible commingling of lawyer-client funds.**

**Pooled interest bearing trust accounts needs to be explained to the client; unless a separate client trust account is established, funds must be put in pooled interest bearing trust account, and all interest will be subject to the IOLTA rules. The Client MAY have a separate client trust account, and should, especially if large amounts of interest will be earned, but the separate client trust account must comply with the rules of 1.15, 1.15A, B, C.**

**Rule 1.15(c). Funds must be kept in trust until accounting AND severance of interest. There should be some agreement made between the client and the lawyer as to whether the client's affirmative assent to payment is required, or if the law firm may consider the client's silence after a stated period of time as assent to payment of the bill. Payment to the law firm on the same day as the invoice, without client agreement to do so, violates the rules. Sufficient time should pass to allow client to object to bill, or to obtain client agreement to pay the bill.**

**Rule 1.15(c) requires that portion of the funds in dispute is to be kept separate until the dispute is resolved. The lawyer should not get paid from the client trust account in the amount of the disputed funds until the dispute is resolved.**

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**Each should, first, take steps to preserve client confidentiality; i.e., to assure that their clients' identity is kept confidential. This is usually done by an agreement between the two lawyers, but might also be done by each lawyer obtaining the consent of their clients to disclose to the other attorney the identity of their clients.**

**Then, each should examine a list of the other's clients, and should determine if the representation of their existing clients in any way conflicts with the representation**

of the other's clients. If so, determination should be made as to whether the conflict is waiveable (Rule 1.7: a) 1) does the lawyer reasonably believe that the representation will not adversely affect the relationship with the other client; and Rule 1.7: a)2) each client must consent after consultation. Adequate disclosure of potential problems to each client must be identified and disclosed. Written waivers are preferable.

If the conflict of interest cannot be resolved by waivers, the conflict must be resolved by terminating the representation of at least one client (if the terminating client ("former client") consents after consultation. Rule 1.9. If the former client will not consent, the firm must withdraw from the representation of both clients, unless the continued representation of one client will not involve the same or a related matter as the previous representation of the former client, and adequate protections can be put in place to assure that information learned in the representation of the former client will not be used in the representation of the continuing client. Rule 1.9(b), (c).

This implicates client confidentiality, not conflicts of interest, because the paralegal does not represent anyone, but is an employee of a lawyer or law firm.

Client confidentiality is required by Rule 1.6. Rule 5.3 requires that a lawyer with supervisory responsibility over a nonlawyer must make reasonable efforts to assure that the non lawyer acts consistent with the lawyer's professional obligations. At a minimum, this means the lawyer must advise the paralegal not to disclose anything that the person learned while working for the other firm. Also "a reasonable effort" would include directing the non lawyer not to work on any cases or transactions on which the nonlawyer worked for his/her previous firm.

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If the ethical question is "arguable" subordinate may follow the instruction under Rule 5.2(b). But if not, the lawyer may have a duty to report the violation under Rule 8.3. Here, the conflict of interest is real, and the representation of one client is directly adverse to the other client. It is a nonwaivable conflict, and even if the firm terminated representation of the inventor, the inventor's consent would be needed to continue representing the new client. Also, there is a breach of the duty to act with reasonable diligence (Rule 1.3) concerning its representation of Inventor. Accordingly, the associate has a duty under 8.3 to report the firm's Professional Conduct violations.

Rule 1.6(a) Confidentiality means you may not disclose potential liability of New Client, or potential rights of Investor, and may not explain client problems or even identities that may be confidential, even to your spouse. You may say that you have a problem with a client that may involve losing the client and this may affect the firm, and your continued employment. Also, you may say that you have an ethical dilemma that may require that you report the firm for violating professional rules. You may even state your belief that the firm has acted in violation of the

**Rules of Professional Conduct, but you may not explain Investor's or New Client's situations to your spouse. The privilege on inter-spousal communications is an evidentiary privilege only, and does not excuse violation of Rule of Professional Conduct.**

**MODEL ANSWER - QUESTION V - FEBRUARY 2006**

1. The police entered the apartment without obtaining a search warrant. Normally probable cause and a search warrant are required to enter a private dwelling. The landlord's consent to the entry did not override the defendant's privacy interest. An exception to the warrant requirement applies where the police have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; the search is not primarily motivated by intent to arrest and seize evidence; and there is some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. Under the circumstances described, the emergency exception is likely to be found applicable here. *State v. Mountford*, 171 Vt. 487 (2000).

2. Referring to the defendant's silence after he was given the Miranda warnings was impermissible. In *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S.Ct. 2240, 2244, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that it was impermissible for the prosecution to use post-arrest silence to impeach the credibility of a defendant who testified where the silence occurred after Miranda warnings were given. Because silence could be the exercise of rights under Miranda, the post-arrest silence is "insolubly ambiguous" and thus cannot be used to show that the defendant had no exculpatory story to tell the police. *Id.* Further, the Court held that the Miranda warnings imply that there will be no penalty for exercise of the rights covered in the warning including the right to remain silent. *Id.* at 618, 96 S.Ct. at 2245. If the prosecution is allowed to use silence to undermine a defense, the defendant will be penalized for the silence. *State v. Percy*, 149 Vt. 623 (1988).

3. Allowing the victim to testify from behind a screen probably violated the defendant's rights under the Confrontation Clause. The Confrontation Clause does not give defendants an absolute right to have a face to face meeting at trial with the witnesses against them. However, a physical, face-to-face confrontation at trial may be denied to a defendant only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. As a general matter, to allow a child victim to testify outside of the presence of a defendant, a trial court must specifically find that such a procedure is necessary to protect the particular child witness' welfare; that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and that the emotional distress suffered by the child in the defendant's presence is more than de minimis. Here, the trial transcript indicates that the trial court erred, for two reasons. *Maryland v. Craig*, 497 U.S. 836 (1990). First, although the child was apparently "frightened" of the defendant, the transcript does not indicate that the trial court made the specific findings of necessity required by *Maryland v. Craig*. Second, the screening procedure employed by the trial court not only prevented the child from seeing the defendant but also prevented the defendant from seeing the child. Neither the U.S. Supreme Court nor the Vermont Supreme Court has approved a procedure that prevents a defendant from seeing the witness testify; nor is such a

procedure necessary to protect a child witness, because the court may instead arrange for the child to testify by closed circuit television. Rule 807 of the Vermont Rules of Criminal Procedure provides a specific procedure for allowing a child witness in a case such as this to testify by closed circuit television, so long as the trial court makes the required findings.

4. Increasing the maximum sentence based upon a factual finding by the judge violated the defendant's Sixth Amendment right to a trial by jury. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme Court held that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Here, the jury verdict exposed the defendant to a maximum sentence of seven years. The judge's finding that the defendant posed a serious threat to the community raised defendant's maximum sentence to ten years. The enhancement of the maximum sentence based on judicial fact finding violated *Apprendi*.

### **MODEL ANSWER - QUESTION VI - FEBRUARY 2006**

1. Parties to a civil union are afforded all the same rights as married couples in Vermont. Therefore, Eddy will go through the same procedures as a parent who had obtained a divorce. Eddy should file a motion in the Family Court to enforce the 2004 custody order. He should ask the court to enforce the existing order which allows him to share physical responsibility for Missy. If Fausto were to move to New Mexico with Missy it would be impossible for Eddy to share physical responsibility as he has been doing so enforcement of the existing order should prevent Fausto from moving. Eddy may want to file the motion as an emergency motion and point out to the court in his affidavit that Fausto says he is moving in three weeks.

Eddy should also file a motion to modify the existing order. His motion should ask that he be awarded sole physical and legal responsibility for Missy in light of Fausto's move. Finally, Eddy should file a motion to modify the child support order asking that Fausto pay child support to Eddy.

2. The Vermont Rules for Family Proceedings, V.R.F.P., Rule 4(j), governs motions for enforcement and modification of Family Court orders. Per Rule 4(j), Eddy must file a motion supported by an affidavit. The motion and affidavit must be served on Fausto personally and not on his attorney, if he has one. Per V.R.F.P. 4(b)(2)(B), the clerk will schedule a hearing on the motion and the notice of hearing will be served along with the motion and affidavit. Service can be by first class mail but given the emergency nature of the motion Eddy should have the sheriff serve the papers. The motion should be filed in Chittenden Family Court as that is the county where Fausto lives and the county where the original judgement was rendered. If Fausto no longer lived in Chittenden County then the motion would be filed in Washington County where Eddy lives. If both Eddy and Fausto filed motions in the county each lives in, the motion could be heard either place if the parties agree. If they can't agree, the court where papers are filed first decides which court will hear the motions. If the case is going to be heard in Washington County, the moving party, presumably Eddy, must file certified copies of the judgement and docket sheet from Chittenden with the Washington clerk.

3. Fausto should file a motion to modify parental rights in the Chittenden Family Court asking that the court award him sole physical responsibility for Missy. He should submit an affidavit with the motion setting out the reasons for his move to New Mexico, including a signed statement from his doctor about his medical need to move to a drier climate. If there are any other compelling reasons for the move that show the move would be in Missy's best interest, he should detail those reasons in the affidavit. He should not move to New Mexico until the court has had a chance to rule on his motion.

4. The Family Court will grant Eddy's motion to enforce the existing order unless Fausto can show that it would be impossible for him to comply. As he is unlikely to be able to show this, the court will enforce the order as written. This will mean that Fausto will not be able to move to New Mexico with Missy unless the court grants his motion to modify parental rights.

In considering Eddy and Fausto's motions to modify the existing order the court will first determine whether there has been a real, substantial and unanticipated change of circumstances. In the case of *Hawkes v. Spence*, 2005 Vt. 27, the Vermont Supreme Court described the standards that would govern a request to reexamine a custody determination based on the relocation of the custodial parent. In *Hawkes*, the Court adopted §2.17(1) of the ALI Principles of the Law of Family Dissolution. Under that section, relocation is a substantial change of circumstances justifying a reexamination of parental rights and responsibilities "only when the relocation significantly impairs either parent's ability to exercise responsibilities the parent has been exercising or attempting to exercise under the parenting plan." The Family Court must consider such factors as "the amount of custodial responsibility each parent has been exercising and for how long, the distance of the move and its duration, and the availability of alternative visitation arrangements...and the amount of custodial responsibility that a parent has been actually exercising rather than the amount allocated but not necessarily exercised under a court order."

If the court determines that the planned relocation is a substantial change of circumstances according to the above factors, the court must then consider whether modification would be in the child's best interest. Based on the ALI standards it seems likely that the court will find that Fausto's planned relocation constitutes a substantial change of circumstances. The court must then consider what is in Missy's best interest. The court will look at such factors as her relationship with each parent and the ability and disposition of each parent to provide her with love, affection and guidance (15 V.S.A. §665(1)); the ability and disposition of each parent to assure that she receives adequate food, clothing, medical care, other material needs and a safe environment (15 V.S.A. §665(2)); the ability and disposition of each parent to meet her present and future developmental needs (15 V.S.A. §665(3)); the quality of her adjustment to her present housing, school and community and the potential effect of any change (15 V.S.A. §665(4)); the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent (15 V.S.A. §665(5)); the quality of her relationship with the primary care provider (15 V.S.A. §665(6)); her relationship with any other person who may significantly affect her (15 V.S.A. §665(7)); the ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning her where parental rights and

responsibilities are to be shared or divided (15 V.S.A. §665(8)) and evidence of abuse (15 V.S.A. §665(9)).

The court will also apply a change of circumstances standard in considering motions to modify child support. 15 V.S.A. §660. In the case of a child support order that has not been modified for at least three years, the court may waive the requirement to show a change of circumstances. A child support order that varies from the guideline for child support by more than ten percent shall be considered a sufficient change of circumstances. Once the court decides that there is a basis for modification of child support the court will apply the child support guidelines in determining future obligations.

If Fausto is successful in modifying the parental rights order so that he can move to New Mexico with Missy, the court will also have to modify Eddy's parent child contact. Likewise, if the court grants Eddy's motion to modify and Fausto moves to New Mexico without her, the court will need to fashion an appropriate parent-child contact schedule for Fausto. In deciding on any new contact schedule the court would look to all the same best interest standards set out in 15 V.S.A. §665.

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